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Contracts, Bills and Notes, and Sales

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CONTRACTS, BILLS AND NOTES, AND SALES

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Since the 1957 Survey includes bills and notes, and sales in addition to contracts, we will endeavor to discuss the cases in their most appropriate branches of law.

I. CONTRACTS

Contracts to Convey Realty

The Supreme Court in *Aust v. Beard*[1] denied specific performance to an alleged parol executory contract for the sale of real estate upon the ground that no valid contract had been entered into between the parties and on the further ground that there had not been sufficient part performance to remove the contract from the operation of the Statute of Frauds. Justice Oxner, in a highly informative opinion, traced the requirements of the "standard of proof" of a contract[2] and held that in the instant factual situation the parties only "intended" in the future to contract, and the case was reversed and remanded for dismissal.[3] The original seller defaulted in the action and the Court, bound by the concurrent findings of the Master and Circuit Judge, treated the subsequent purchaser as if he occupied a position no stronger than the seller, since the findings had been that he bought the real estate with actual knowledge that another was claiming possession under the alleged parol contract.

Thomas v. Jeffcoat[4] is of interest to the Bar in general and of particular interest to lawyers with a real estate clientele. After the purchaser refused to go through with the sale, the seller brought suit against the purchaser and broker seeking

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1. 230 S. C. 515, 96 S. E. 2d 558 (1957).
2. See 96 S. E. 2d 561-562 wherein the case law relating to the standard of proof is reviewed.
3. The decision appears eminently sound. The plaintiff's testimony was "I intended to buy them this spring," and the allegation of the complaint was that the purchase price was $6,000 *or* $6,500. Furthermore, there is no justification for ordering specific performance at $8,500, the amount the subsequent purchaser paid. See 96 S. E. 2d 562.
4. 230 S. C. 126, 94 S. E. 2d 240 (1956).

to recover the earnest money that had been deposited by the purchaser with the broker. The seller introduced the contract of sale into evidence and rested his case. The purchaser sought to show that the lot was not as represented and sought a directed verdict in his favor. The broker, relying upon proof of the local custom, sought a directed verdict in his favor for one-half of the earnest money in case the contract were held valid. The Supreme Court, in affirming the trial court's directed verdict for the plaintiff, held the construction of the contract a matter of law for the court since the language relating to the earnest money was clear and unambiguous.[5] Chief Justice Stukes, writing a concurring opinion, pointed out that regardless of the custom, the broker would not be entitled to the earnest money unless specifically provided for in the contract. The Chief Justice also pointed out that to permit recovery by the broker in this situation would allow him to benefit from his wrong, since there had been an innocent misrepresentation regarding the property by the broker's employee to the purchaser.[6]

Dean v. Dean[7] held invalid an alleged contract between a mother and four of her children wherein one of the children had not executed the contract. The parties had inherited an interest in realty and under the terms of the alleged contract the children assigned the income to the mother for life in consideration of her agreeing to devise her interest to the four children. Thereafter, the mother died, devising the property to certain grandchildren, and the three children who had signed the contract sought enforcement. In determining that the alleged contract could not be enforced because it was not fully executed by all of the parties, the Court reasoned that the obligation imposed was joint, not several, and that it was, therefore, necessary for all parties to sign the contract in order to make it effective.

Fourth Circuit Construes Public Contract Regarding Payment of Use Tax

Judge Sobeloff, in *McJunkin Corporation v. City of Orange-*

5. The contract provision is as follows:
The purchaser hereby agrees and fully understands that the earnest money deposit will be retained by the Seller in the event that the purchaser fails to settle within 60 days period provided herein making the total purchase price $4,500.00. * * * 230 S. C. 129, 94 S. E. 2d 241.
6. Query the result if the broker had a written contract?
7. 229 S. C. 430, 93 S. E. 2d 206 (1956).

burg,[8] held the bidder, and not the City, liable for the South Carolina use or sales tax resulting from a municipal improvement. The original specifications, drawn up when it was intended that the contractor would do a complete installation, contained language which made it evident that the bidder was to pay the tax.[9] The language of the addendum was not as clear, and the addendum sought several alternative proposals, instead of the "package deal."[10] The Court stated that the "change in scope of the contract awarded does not expunge any items or conditions of the original specifications not in conflict with the Addendum,"[11] and quickly reverted to the original specifications to clear up any ambiguity existing in the language of the addendum. Treating the case as one not requiring oral testimony to clear up any ambiguity, the Court, nevertheless, pointed out that the City had informed the bidder that the bid price should include the tax.

Termination of Agency Contract

The only other contract case before the Fourth Circuit was *A. A. Brooks v. Jack's Cookie Company*,[12] which was on appeal for the second time. In the first appeal,[13] the Court held that the case should have been submitted to the jury on the issue of breach of contract. Citing Williston,[14] the Court held the manufacturer was not at liberty to terminate the agreement at will, even though the agreement contained no provision for its termination, but the manufacturer must retain the agent in its employment for a reasonable period of time. The second appeal involved only the question of whether the trial judge had charged the jury correctly, which the Appellate Court held had been done, although the exact language of the prior holding was not used by the District Court.

Allegation of Payment to Unauthorized Person May Be Stricken As Irrelevant

The plaintiff, an assignee, sued in *Olympic Radio and Television, Inc. v. Baker*,[15] for the balance owing by the defendant

8. 238 F. 2d 528 (4th Cir. 1956).
9. See 238 F. 2d 530 for quotation of the original specifications.
10. See 238 F. 2d 530 for the language of the addendum.
11. 238 F. 2d 531.
12. 238 F. 2d 69 (4th Cir. 1956).
13. Jack's Cookie Company v. A. A. Brooks, 227 F. 2d 935 (4th Cir. 1955).
14. WILLISTON ON CONTRACTS, § 1027 (a) p. 2852.
15. 230 S. C. 383, 95 S. E. 2d 636 (1956).

for the purchase of three television sets. The defendant in his answer sought to allege payment to an agent and servant of the plaintiff's assignor. The plaintiff's motion to strike this allegation was denied by the lower court but the Supreme Court reversed, holding that the allegation was irrelevant since there was no allegation that the claim payment was made to the assignee of the obligation or to one expressly or impliedly authorized to receive it on behalf of the assignee.

Breach of Warranty

Two cases, *Spartanburg Hotel Corporation v. Smith*,[16] and *Cannon v. Pulliam Motor Company*,[17] involved contract questions, but they will be discussed under Sales.

II. SALES

Breach of Express or Implied Warranty

The plaintiff in *Odom v. Ford Motor Company*[18] sought to recover damages for an alleged breach of warranty of soundness and fitness of a tractor. The tractor was manufactured by the defendant, sold to its Charlotte distributor, who, in turn, sold it to a local dealer from whom it was purchased by the plaintiff. The complaint alleged an oral express warranty as to quality and adaptability claimed to have been made by the local dealer, and also an implied warranty by the manufacturer as to the fitness and adaptability of the tractor for agriculture purposes. At the commencement of the trial, the defendant moved to require the plaintiff to elect whether to proceed under the express warranty or implied warranty. Judge Pruitt reserved his ruling, and after the testimony showed that the local dealer was not an agent of the defendant and that he did not have any authority to bind the defendant by any representation or warranty, the plaintiff elected to proceed solely on an implied warranty theory. The jury returned a verdict for the plaintiff and although numerous exceptions were made, our Supreme Court considered only the defendant's contention that the action could not be maintained against it on an implied warranty because of lack of privity of contract. Justice Oxner cited the general rule that the warranty of a chattel does not run with the property but that it

16. 231 S. C. 1, 97 S. E. 2d 199 (1957).
17. 230 S. C. 131, 94 S. E. 2d 397 (1956).
18. 230 S. C. 320, 95 S. E. 2d 601 (1956).

is personal to the purchaser to whom the warranty is made[19] and noted the various exceptions that have arisen wherein the third party or ultimate consumer is allowed to maintain an action against the manufacturer despite the absence of privity of contract.[20] The Court's reasoning is that the exceptions which have arisen are exceptions based on negligence or tort actions, whereas, in the case at Bar it was a contractual obligation and that absence of privity barred recovery.

The Court pointed out that recovery may be allowed on the theory of express warranty without a showing of privity "where the purchaser of an article relied on representations made by the manufacturer in advertising material".[21] This language, when considered with the lengthy quote from the Georgia case of *Studebaker Corporation v. Nail*[22] cited in *Spartanburg Hotel Corporation v. Smith*,[23] could indicate a broadening of the application of this theory. The Georgia case indicated that consideration was present between the manufacturer and the purchaser and that the intermediate distributors and dealers were "merely a means of distribution to the ultimate purchaser". The Spartanburg Hotel case was an action for breach of express oral warranty made by the manufacturer's agent, and the Court brushed aside the fact that the sale had been billed in the name of a local dealer. The Court held that there was sufficient evidence for the jury to conclude that the sale had been made by the manufacturer and the purchaser and that the local billing was part and parcel of the contract. The Court reemphasized the fact that even if the local dealer were an independent contractor, that it becomes of no importance when the warranty was made directly to the purchaser. Another feature of the case was the Court's treatment of the defense of accord and satisfaction. After a review of the history of the defense of accord and satisfaction, the Court held that the mere cashing of two of the manufacturer's checks by the purchaser did not as a matter of law give rise to the defense of accord and satisfac-

19. The Court cited for this proposition the leading case of Mauldin v. Milford, 127 S. C. 508, 121 S. E. 547 (1922).
20. The Court cited Justice Cardoza's celebrated decision of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 which greatly expanded the scope of the exceptions which had existed since common law.
21. 230 S. C. 328, 95 S. E. 2d 605 (1956).
22. 82 Ga. App. 779, 62 S. E. 2d 198 (1950).
23. 231 S. C. 1, 97 S. E. 2d 199 (1957).

tion. The case was reversed on the question of damages, which point will be discussed under the survey article on that subject.

Cannon v. Pulliam Motor Co.[24] involved the construction of the Ford Motor Company warranty.[25] In the trial court the plaintiff obtained a verdict after the court concluded that the warranty was ambiguous leaving its construction to the jury. The Supreme Court held that the language was not ambiguous and that it was error for the trial court to allow interpretation to be placed on the words by the jury. An excellent discussion and case analysis is contained in the opinion dealing with the question of how much opportunity must be given to the contractor to remedy defects which exist.

The Fourth Circuit in *Ralston Purina Co. v. Edmunds*,[26] held that the plaintiff failed to introduce sufficient evidence to get the case to the jury. The plaintiff alleged that Purina made certain changes in the size of its turkey feed pellets (from 2/16th inch to 5/32nds inch) and that the new pellets were different in color and harder in texture (which Purina denied). The reason given for the directed verdict was the causal relationship between the subsequent loss of productivity to the change in the pellets was not shown, the pellet change being a mere possibility rather than a probable cause.

Long Manufacturing Co. v. Manning Tractor Co.,[27] a suit for balance due on certain equipment, involved a defense by Manning alleging that Long's goods were defective and that Long (a manufacturer) had failed to comply with its warranty to service and furnish proper parts. The point actually decided on appeal was whether some five purchasers might join the suit as parties to the action so that they might assert claims against Long. The Supreme Court affirmed Judge Eatmon's Order denying them permission to enter the suit.

Sumter Electric Rewinding Co. v. Aiken County S. C. Clays, Inc.[28] presented a factual situation wherein the alleged purchaser could not inspect the equipment because of its location but relied upon the seller's representations and executed

24. 230 S. C. 131, 94 S. E. 2d 397 (1956).
25. The warranty and contract provision appear at 230 S. C. 135, 94 S. E. 2d 399.
26. 241 F. 2d 164 (4th Cir. 1957).
27. 229 S. C. 301, 92 S. E. 2d 700 (1956).
28. 230 S. C. 229, 95 S. E. 2d 259 (1956).

the purchase note. The trial court reversed the Master (to whom it had been referred by consent), holding that the sale was contingent on the opportunity to inspect and this was affirmed by the Supreme Court.

III. BILLS AND NOTES

Two interesting cases hinged on the question of determining whether the parties were holders in due course without notice. Justice Taylor in a concise opinion in *Johnston v. The Farmers and Merchants Bank*[29] held that a payee of a note is not a holder in due course without notice and that it was error for the trial court to disallow evidence attempting to show partial failure of consideration. In *Carolina Housing & Mortgage Corporation v. Reynolds*,[30] the maker of the note was sued by the purchaser for the value of the note. The note was given to the contractor for repairs on the maker's home, and the contractor thereafter negotiated it to the plaintiff. The plaintiff had inspected the house and the maker sought to defend on the failure of consideration. The Court in determining that the purchaser was a holder in due course reasoned that the purchaser did not have "actual knowledge" of the defect and that it was under no obligation to have made the inspection initially and that it would not be liable if the inspection had not been properly made.

Carolina Housing & Mortgage Corporation v. Orange Hill A.M.E. Church[31] was in essence a procedural question since the issue was whether the original payee of a note should be joined as a party defendant after the maker placed at issue the validity of the note. In affirming the trial court's decision that the payee is a proper party, Justice Moss traces the obligation of the payee, even if his assignment is without recourse.

Accommodation Party — Right to Have Mortgage Cancelled

Clanton v. Clanton[32] was an action initiated by a wife seeking a divorce from her husband and related relief consisting of the cancellation of a certain mortgage executed by the wife and her husband. The note which accompanied the mort-

29. 229 S. C. 603, 93 S. E. 2d 916 (1956).
30. 230 S. C. 491, 96 S. E. 2d 485 (1957).
31. 230 S. C. 498, 97 S. E. 2d 28 (1957).
32. 229 S. C. 356, 92 S. E. 2d 878 (1956).

gage had been signed by the husband and endorsed by the wife. The note was payable to the bank and the proceeds were placed in a separate bank account designated as a reserve account and controlled by the bank as security against losses it might incur through the handling of a large volume of the husband's checks. The wife simultaneously executed a warranty agreement to the bank which provided that her guaranty was not to be affected by any other security that the bank might have from the husband, that the bank might require her to pay any loan made to the husband without first exhausting its security, and that it should cover future advances. Thereafter, the husband drew a check on the account in the amount of the note and mortgage payable to the bank who, thereafter, assigned the note and mortgage to one of the husband's corporate enterprises. After reaching an initial conclusion that the wife was an accommodation party[33] since she received no value for endorsing the note, the Court held that there was not a valid assignment by the bank to the husband's corporation. The Court further held that since the purpose for which the note and mortgage had been given had been fulfilled that the wife was therefore entitled to have the mortgage satisfied. The basis of the Court's reasoning was that the assignment was not for valuable consideration and that it was taken subject to all of the equities and defenses existing in favor of the wife since the corporation was not a bona fide holder of the note and mortgage.

Justice Taylor in *Shocket v. Fickling*[34] reemphasized the ancient rule that when valid or valuable consideration for a note exists, its adequacy or sufficiency is ordinarily immaterial even if the property subsequently becomes of little value.

33. As defined in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 8-846.
34. 229 S. C. 412, 93 S. E. 2d 203 (1956).